

COPY

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

SUPREME JUDICIAL COURT
SINGLE JUSTICE SESSION
NO.SJ-2018-386

COMMONWEALTH)
)
v.)
)
ALEXA FENCHER)
Barnstable County Superior Court)
Indictment: 1772CR00011)

DEFENDANT'S OPPOSITION TO COMMONWEALTH'S
APPLICATION FOR INTERLOCUTORY RELIEF

Now comes the Defendant, Alexa Fencher, opposing the Commonwealth's Petition for Interlocutory Appeal, of the Superior Court judge's allowance of her Motion to Suppress the seizure of her cell phone.

As grounds for this opposition the Defendant states:

1. That the hearing judge did not err in his application of constitutional principles to the facts as he found them. His findings concerning the timing of the seizure of the cell phone and lack of probable cause, is well supported by Massachusetts case law.
2. That the Commonwealth did not meet their burden to show that the warrantless seizure fell within the narrow class of permissible exceptions to the warrant requirement and that any exigency existed which prevented the police from first obtaining a warrant.

ARGUMENT

1. The hearing judge did not err in his application of constitutional principles to the facts as he found them. His findings concerning the timing of the seizure of the cell phone and lack of probable cause, is well supported by Massachusetts case law.

The Commonwealth maintains that the hearing judge erred when he found there was no probable cause to seize the Defendant's phone at 10:13, 10:14 on the morning she was questioned by the police and that the alleged consent some 15 minutes later, was tainted by the illegal seizures. (F1-4)

The problem with the Commonwealth's argument is that the SJC has rejected the proposition "that there exists a nexus between a suspect's criminal acts and his or her cellular telephone whenever there is probable cause that the suspect was involved in an offense, [even when] accompanied by an officer's averment that, given the type of crime under investigation, the device likely would contain evidence." Commonwealth v. Jordan, 91 Mass. App. Ct. 743, 750 (2017), citing White, ante, at 591.

In the case at bar, the police did not possess any statement from the Defendant or any other reliable source that the Defendant used the phone in the course

of or in the planning of the alleged crime. There are no specific and articulable facts, like the kind found in an affidavit in support of a valid search warrant, to support a probable cause finding that the Defendant's cell phone would contain any admissions or other evidence connecting the Defendant to the alleged crime. The Commonwealth does not claim that the alleged victim told the officers that the Defendant was the one who assaulted him or that she was present in the residence when the event occurred. At the point in the investigation where the phone was seized, the Commonwealth's facts are no more specific than the facts in Commonwealth v. White, 475 Mass. 583 (2016) (a warrantless seizure of a cell phone where the Commonwealth eventually obtained and executed a search warrant).

When the location of the search or seizure is a computer-like device, such as a cellular telephone, "the opinions of the investigating officers do "not, alone, furnish the requisite nexus between the criminal activity and the [device] to be searched" or seized". Commonwealth v. Anthony, 451 Mass. 59, 72(2008) (search warrant for computer). See and compare Commonwealth v. Kenney, 449 Mass. 840, 846

(2007) ("We do not rely on [the officer's conclusion as to what the facts in the affidavit mean to him... to provide probable cause [to search a computer] where evidence to support such a finding is otherwise lacking").

In order to conduct this kind of a seizure the police first must obtain information that establishes the existence the kind of "particularized evidence" related to the crime, see and compare for example, Commonwealth v. Dorelas, 473 Mass 496, 498-503 (2016) (search warrant case), where the police had specific information that the defendant had received threatening calls and text messages on the cell phone. And Commonwealth v. Cruzado, 480 Mass. 275, 282 (2018), a warrantless seizure of a cell phone, where the police had probable cause to believe that the cell phone possessed by the defendant would contain evidence of the crime because they had information that defendant and victim had been together on the day of the murder, the victim's boyfriend had recently overheard defendant confessing to the murder to an unidentified person on a cell phone, and the cell phone would have been at risk of theft or vandalism given the area where it was found (exigency). The

Cruzado case, the only warrantless case of this kind, found by the defense post White, indicates that probable cause, an exception to the exclusionary rule (evidence of a crime) and exigency are all required for lawful warrantless search of a cell phone.

"Police may not rely on the general ubiquitous presence of cellular telephones in daily life, or an inference that friends or associates most often communicate by cellular telephone, as a substitute for particularized information that a specific device contains evidence of a crime." White, *supra*, at 590-591.

"Even where there is probable cause to suspect the defendant of a crime, police may not seize or search his or her cellular telephone to look for evidence unless they have information establishing the existence of particularized evidence likely to be found there." See Commonwealth v. Morin, 478 Mass. 415, 426 (2017) a search warrant case examining the affidavit for probable cause, citing White, *supra*, 590-591.

In Morin, the affidavit in support of a search warrant for the cell phone indicated that the co-defendant "made several telephone calls to [the

defendant] before and after" the time of the homicide. The court held that at best, the affidavit established a personal relationship between the individual who brought the victim to the hospital and the defendant, and that they had communicated by cellular telephone before and after the killing, but that nothing in the affidavit indicated the defendant's cellular telephone would contain particular evidence related to the crime under investigation. That while the affidavit indicated the defendant used his cellular telephone at unspecified times to communicate with someone implicated in the crime did elevate "their relationship to a matter of importance in the investigation[;], **it did not, without more, justify intrusion into the content of that communication"** .

The Morin court held that based on the limited information presented, the affiant's statement that the defendant's telephone would lead to evidence of "the individuals involved" in the victim's death was merely conclusory and did not support a determination of probable cause. See also Commonwealth v. Broom, 474 Mass. 486,496 (2016), another search warrant case where the affidavit failed to point to "particularized evidence" suggesting that contents of cellular

telephone were likely to contain information linking defendant to victim or relating to death of victim, and Commonwealth v. Jordan, 91 Mass.App.Ct. 743, 750-751 (2017), a search warrant affidavit that contained no probable cause to search for text messages where affidavit merely established that defendant used cellular telephone four hours before killing and used it to contact family members near time of killing.

In the case at bar, the Defendant used her phone on the night of the alleged assault and she told the police that she used it while she was out with her friends at specific places. (D.Int.6,7,8,9,10) However, the Commonwealth has not alleged that either the Defendant or any other reliable source provided them with information that she used the phone in the course of the alleged crime or that any evidence connected to that crime would be located on that phone.

The hearing judge clearly found that the requisite probable cause did not exist at 10:13-10:14 am when the phone was seized, just 15 minutes prior to its search. (F1/4)

The Commonwealth's averment that the Defendant "admitted her phone contained communications related

to the vicious assault"¹ is hyperbole. The interview indicates that the Defendant told the officers that her grandmother called her the morning after the alleged assault, told her of the event, that her uncle had been badly hurt and told her that the police thought the Defendant was a witness. The interview indicates that the Defendant's knowledge of the alleged assault comes to her through her grandmother's telephone call. (D.Int.6,7,9,10, 26.)

2. The Commonwealth did not meet their burden to show that the warrantless seizure fell within the narrow class of permissible exceptions to the warrant requirement and that any exigency existed which prevented the police from first obtaining a warrant.

Here the Defendant maintains that even if the Commonwealth could show probable cause for the seizure of the phone at the time it was seized, they never applied for or obtained a search warrant for the warrant and they have not identified any permissible exception to the warrant requirement and an exigency sufficient to dispense with the warrant requirement. Instead the Commonwealth's relies on the alleged consent, which the hearing judge held occurred some

¹ Commonwealth's Application page 14¶B.

fifteen (15) minutes after, what he found to be the illegal seizure of the phone. (F/1-4)

Individuals have an objectively reasonable expectation of privacy in text messages. Commonwealth v. Fulgaim, 477 Mass. 20, 34, cert. denied, 138 S.Ct. 330, 199 L.Ed. 221(2017), citing White, supra 588. It is immaterial as to whether the content of the text messages were obtained through forensic searches of the defendants' cellular telephones or through the records of the cellular telephone service provider, because the police could not seek a warrant in either case without first establishing the nexus between the homicide and the defendant's cellular communications. See Commonwealth v. Holley, 478 Mass. 508, 522 n.19 (2017) (case analyzing affidavit in support of search warrant).

The burden is on the Commonwealth to show that the search falls within a narrow class of permissible exceptions to the warrant requirement. Commonwealth v. Craan, 469 Mass. 24, 25 (2014). See Commonwealth v. Mauricio, 477 Mass. 588 (2017) (where the officers seized digital images from a camera without any showing of an exception to the exclusionary rule; evidence was suppressed.)

The Fourth Amendment and art. 14, guarantee "that every person has the right to be secure against unreasonable searches and seizures" of his or her possessions.²

"If the Commonwealth conducts a search or seizure without first obtaining a warrant, the search or seizure is "presumptively unreasonable" and, therefore, presumptively unconstitutional." White, supra, 587-588, citations omitted. "[T]he general requirement that a search warrant be obtained is not lightly to be dispensed with, and 'the burden is on those seeking [an] exemption [from the requirement] to show the need for it" Commonwealth v. Antobenedetto, 366 Mass. 51, 57 (1974) citations omitted.

Although police are permitted to hold a seized item for "the relatively short period of time needed ... to obtain a search warrant," they must "release the item if a warrant is not obtained within that period." White, supra 593, citations omitted. "We analyze each case on its own facts, "balanc[ing] the nature and quality of the intrusion on the individual's [interests under the Fourth Amendment to the United

² Commonwealth v. Porter P., 456 Mass. 254, 260 (2010)

States Constitution] against the importance of the government interests alleged to justify the intrusion." *Id.* at 593-594, citations omitted.

In 2013, the 1st Circuit Court held that absent exigent circumstances even "the search-incident-to-arrest exception does not authorize the warrantless search of data on a cell phone seized from an arrestee's person" U.S. v. Wurie, 728 F.3d 1 (1st Cir. 2013). "Since the time of its framing, "the central concern underlying the Fourth Amendment" has been ensuring that law enforcement officials do not have "unbridled discretion to rummage at will among a person's private effects." Wurie, citations omitted. "Today many Americans store their most personal "papers" and "effects," U.S. Const. amend. IV, in electronic format on a **cell phone**, (emphasis original) carried on the person. "At bottom, we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" (Wurie, quoting Kyllo v. United States, 522 U.S. 27, 34, 121 S. Ct. 2083, 150 L.Ed. 2nd 94 (2001)). While the Wurie Court did take the time to qualify the kind of exigent circumstances that might allow the police to conduct an immediate, warrantless search of

a cell phone's data as circumstances where there is "probable cause to believe that the phone contains evidence of a crime, as well as a compelling need to act quickly that makes it impracticable for them to obtain a warrant -- for example, where the phone is believed to contain evidence necessary to locate a kidnapped child or to investigate a bombing plot or incident." These kind of exigent circumstances are not present in the case at bar.

The Defendant maintains that White, supra, where the seizure of a cell phone was found to be in violation of the 4th Amendment, contains facts very similar to the case at bar. Like the case at bar the police were investigating a violent crime; suspicion had focused on the defendant as one of the perpetrators of the crime; a detective seized the cell phone to prevent the defendant from retrieving it and removing evidence or destroying the device; and the seizing officer had no information that the cellular telephone had been used to plan, commit, or cover up the crime, or that it contained any evidence of a crime.

CONCLUSION

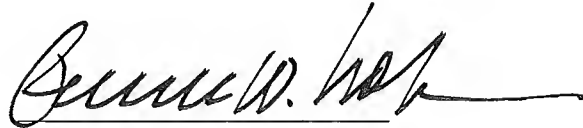
The Defendant maintains that the seizing officer did not possess sufficient facts to support a probable cause finding that the Defendant had committed the alleged assault; was involved in the planning or execution of the alleged assault; and that there were exigent circumstances present to bypass the warrant requirement.

The exclusionary rule bars the admission of evidence seized in violation of the Fourth Amendment to the United States Constitution or Article 14 of the Massachusetts Declaration of Rights. See Commonwealth v. Bishop, 402 Mass. 449, 451 (1988).

In the present case, the hearing judge did not err in the application of the facts, as he found them to be within the Constitutional principles and Massachusetts case law.

Wherefore, the Defendant prays that the Commonwealth's petition for interlocutory review of the allowance of his motion to suppress be denied and that she be awarded attorney's fees and costs associated with defending this appeal.

Respectfully submitted,
Alexa Fencher,
by her Attorney,

A handwritten signature in black ink, appearing to read "Robert W. Nolan", with a long horizontal flourish extending to the right.

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Dated: August 30, 2018

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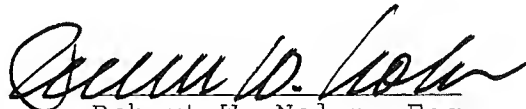
Certificate of Service

I, Robert W. Nolan, attorney on file for the defendant, hereby certify that I served via United States Priority Mail, postage prepaid, a copy of the Defendant's Opposition to the Commonwealth's Application for Interlocutory Relief on this 30th day of August, 2018, and have served same to:

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Signed under the pains and penalties of perjury, this 30th day of August, 2018.

Respectfully submitted,



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